Gloria J. Verno d/b/a Joe's Painting and its alter ego Joe's Painting, Inc. *and* International Union of Painters and Allied Trades, District Council 57 of Western Pennsylvania, AFL–CIO, CLC. Case 6–CA–36647

September 30, 2010

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and amended charges filed by the Union on September 14 and November 12, 2009, and May 26, 2010, respectively, the Acting General Counsel issued the complaint on June 30, 2010, against Gloria J. Verno d/b/a Joe's Painting and its alter ego Joe's Painting, Inc. (collectively the Respondent), alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On July 28, 2010, the Acting General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on July 29, 2010, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was received by July 14, 2010, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the Acting General Counsel's motion disclose that the Region, by letter dated July 15, 2010, notified the Respondent that unless an answer was received by the close of business on the third business day following receipt of the letter, a motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file an answer, we grant the Acting General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent Gloria J. Verno d/b/a Joe's Painting and Respondent Joe's Painting, Inc. have had substantially identical management, business purpose, operations, equipment, customers, and supervision, as well as ownership.

About December 15, 2008, Respondent Joe's Painting, Inc. was established by Respondent Gloria J. Verno d/b/a Joe's Painting, as a continuation of Respondent Gloria J. Verno d/b/a Joe's Painting.

Based on the operations and conduct described above, Respondent Gloria J. Verno d/b/a Joe's Painting and Respondent Joe's Painting, Inc. are, and have been at all material times, alter egos.

At all material times Respondent Gloria J. Verno d/b/a Joe's Painting has been owned by Gloria J. Verno, a sole proprietorship, doing business in the construction industry as Joe's Painting, performing commercial and residential painting work.

At all material times, Respondent Joe's Painting, Inc., a Pennsylvania corporation, with an office and place of business in Coal Center, Pennsylvania, has been engaged as a painting contractor in the construction industry performing commercial and residential painting work.

During the 12-month period ending August 31, 2008, Respondent Gloria J. Verno d/b/a Joe's Painting and the Respondent, in conducting its business operations described above, purchased and received at its Coal Center, Pennsylvania facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

During the 12-month period ending January 1, 2010, Respondent Joe's Painting, Inc. and the Respondent, in conducting its business operations described above, purchased and received at its Coal Center, Pennsylvania facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

We find that Respondent Gloria J. Verno d/b/a Joe's Painting; Respondent Joe's Painting, Inc.; and the Respondent are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that International Union of Painters and Allied Trades, District Council 57 of Western Pennsylvania, AFL–CIO, CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the

meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Gloria J. Verno - Owner of Respondent Gloria J. Verno d/b/a Joe's Painting President of Respondent Joe's Painting, Inc.

Joseph P. Verno - Project Manager

About August 14, 2008, Respondent Gloria J. Verno d/b/a Joe's Painting, an employer engaged in the building and construction industry, entered into a collective-bargaining agreement with respect to the terms and conditions of employment of the unit, which is effective for the period June 1, 2008 through May 31, 2011, whereby it recognized the Union as the exclusive collective-bargaining representative of the unit.

Since about August 14, 2008, pursuant to the 2008–2011 agreement described above, the Union has been recognized as the exclusive collective-bargaining representative of the unit by the Respondent without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act.

The unit as set forth in the 2008–2011 collective-bargaining agreement constitutes an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[1]

For the period from August 14, 2008 to May 31, 2011, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.[2]

Article VI of the 2008–2011 collective-bargaining agreement provides the wages and fringe benefit rates to be paid to unit employees.

Since about August 14, 2008, the Respondent has abrogated the terms and conditions of the 2008–2011 collective-bargaining agreement by failing to apply the collective-bargaining agreement, including wage and fringe benefit rates, on its job projects.[3]

The Respondent engaged in the conduct described in the preceding paragraph without the Union's consent. The terms and conditions of employment described in the preceding paragraph are mandatory subjects for the purpose of collective bargaining.

CONCLUSION OF LAW

By abrogating the terms and conditions of the 2008–2011 collective-bargaining agreement, the Respondent has failed and refused to bargain collectively and in good faith with the limited exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by abrogating the terms and conditions of the 2008–2011 collective-bargaining agreement by failing, since about August 14, 2008, to honor the contractually required wage and fringe benefit rates on its projects, we shall order the Respondent to comply with the 2008–2011 collective-bargaining agreement, and to make the unit employees whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct, by paying them the contractual wages applicable to its job projects, retroactive to August 14, 2008, in the manner set forth in *Ogle Protection Service,* 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondent shall make whole the unit employees by making all fringe benefit payments that have not been made since August 14, 2008, and that would have been made but for the Respondent's unlawful failure to make them, including any additional amounts applicable to such delinquent payments as set forth in *Merryweather Optical Co.,* 240

[1] There is no specific unit description set forth in the complaint. However, in light of the Respondent's failure to file an answer to the complaint, there is no dispute that the unit described in the 2008–2011 collective-bargaining agreement is appropriate.

[2] The complaint alleges that the Respondent is a construction industry employer and that it granted recognition to the Union without regard to whether the Union had established majority status. Accordingly, we find that the relationship was entered into pursuant to Sec. 8(f) of the Act and that the Union is therefore the exclusive representative of the unit employees for the period covered by the contract. See, e.g., *A.S.B. Cloture, Ltd.*, 313 NLRB 1012 (1994).

[3] The complaint alleges a failure to apply the agreement since August 14, 2008, more than 6 months before the filing of the charge. However, the 6-month limitations period in Sec. 10(b) of the Act is an affirmative defense that is waived if not timely raised. See, e.g., *Newspaper & Mail Deliverers (New York Post)*, 337 NLRB 608, 609 (2002) (citing *Public Service Co.*, 312 NLRB 459, 461 (1993)). As the Respondent has failed to file an answer to the complaint or a response to the notice to show cause, and has failed to raise a 10(b) defense, we therefore find the violations as alleged and issue an appropriate remedial order. See, e.g., *Malik Roofing Corp.*, 338 NLRB 930, 931 fn. 3 (2003); *J.F. Morris Co.*, 292 NLRB 869, 870 fn. 2 (1989), enfd. mem. 881 F.2d 1076 (6th Cir. 1989).

NLRB 1213, 1216 (1979).[4] The Respondent shall also reimburse unit employees for any expenses ensuing from its failure to make the required payments to the fringe benefit funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Gloria J. Verno d/b/a Joe's Painting and its alter ego Joe's Painting, Inc., Coal Center, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with International Union of Painters and Allied Trades, District Council 57 of Western Pennsylvania, AFL–CIO, CLC, as the limited exclusive collective-bargaining representative of the employees in the bargaining unit, as set forth in the 2008–2011 collective-bargaining agreement, by abrogating the terms and conditions of the agreement by failing to apply the agreement, including wage and fringe benefit rates, to its job projects.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Adhere to the terms and conditions of the 2008–2011 collective-bargaining agreement with the Union.

(b) Make whole the employees in the bargaining unit, as set forth in the 2008–2011 collective-bargaining agreement, for any loss of earnings and other benefits resulting from the Respondent's unlawful conduct, with interest, in the manner set forth in the remedy section of this decision.

(c) Make all contractually required benefit fund contributions, if any, that have not been made on behalf of employees in the unit since August 14, 2008, and reimburse unit employees for any expenses ensuing from the Respondent's failure to make the required payments, with interest, in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Coal Center, Pennsylvania, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 14, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] The complaint alleges, among other things, that: (1) the Respondent violated Sec. 8(a)(5) and (1) by failing to pay the fringe benefit rates specified in the parties' collective-bargaining agreement; and (2) those fringe benefit rates are "terms and conditions of employment [and] are mandatory subjects for the purpose of collective bargaining." By failing to file an answer to the complaint, the Respondent admitted those allegations. Accordingly, we have found that the Respondent violated the Act in that manner. We note, however, that the complaint did not specify those fringe benefit rates and did not specify the nature of the trust funds, if any, to which contributions at those rates are made. Our order, therefore, directs the Respondent to make employees whole with respect to those benefits, but does not foreclose the Respondent, at the compliance stage of this proceeding, from showing that there are some contractual fringe benefits that are permissive subjects of bargaining and hence not covered by our Order. See, e.g., *Finger Lakes Plumbing & Heating Co.*, 254 NLRB 1399, 1399 (1981).

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. September 30, 2010

Craig Becker, Member

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with International Union of Painters and Allied Trades, District Council 57 of Western Pennsylvania, AFL–CIO, CLC, as the limited exclusive collective-bargaining representative of the employees in the bargaining unit, as set forth in the 2008–2011 collective-bargaining agreement, by abrogating the terms and conditions of the agreement by failing to apply the agreement, including wage and fringe benefit rates, to our job projects.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL adhere to the terms and conditions of the 2008–2011 collective-bargaining agreement with the Union.

WE WILL make whole the employees in the bargaining unit, as set forth in the 2008–2011 collective-bargaining agreement, for any loss of earnings and other benefits resulting from our unlawful conduct, with interest.

WE WILL make all contractually-required benefit fund contributions, if any, that have not been made on behalf of employees in the unit since August 14, 2008, and WE WILL reimburse unit employees for any expenses ensuing from our failure to make the required payments, with interest.

GLORIA J. VERNO D/B/A JOE'S PAINTING AND ITS ALTER EGO JOE'S PAINTING, INC.